IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1082 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AMBALAL NANDLAL

Versus

STATE OF GUJARAT

Appearance:

MR PM VYAS for Appellant

MR SUDHANSU S. PATEL, APP for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 05/08/2004

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE J.R.VORA)

1. This Appeal is preferred under the provisions of Section 374(2) of the Code of Criminal Procedure Code, 1973 is addressed against judgment and order delivered by learned Additional Sessions Judge, Mehsana, on 8th of November, 1996, convicting the appellant under Section 302 of the Indian Penal Code and sentencing him to rigorous imprisonment for life and fine of Rs.500/-, in default, rigorous imprisonment for three months. The appellant was prosecuted but acquitted of the charge levelled against him for the offence punishable under Section 135 of the Bombay Police Act. However, this acquittal is not the subject matter of channge by the State Government.

2. Deceased and victim in this case is father while accused - appellant herein happens to be his son. Prosecution story discloses that the incident in question occurred on 14th of April, 1996 at about 3.00 p.m. at village Ambod, Taluka Mansa of Mehsana District. The appellant had some dispute against his father in respect of money, which deceased father had kept in Fixed Deposit Receipt, maintained with a Bank and on this account, present appellant was picking up quarrels with the deceased demanding money from his father. On the day of the incident, accused started beating deceased with a thick stick (dhoka i.e. club - like piece of wood) and inflicted many blows. Hearing his shouts, Amrutlal Manilal Darji, PW-14 conveyed to PW-13 Mahendrasinh Kanasinh Chavda that the appellant was beating his father. PW-13 Mahendrasinh Kanasinh Chavda in turn conveyed to PW-2 Chavda Bheruji Pathuji, PW-9 Mafaji Gobarji and others sitting in the temple of God Ramji that the accused was beating his father and that they should go to rescue him. Thereafter, immediately, Chavda Karansinh Bhikhaji, Mafaji Gobarji-PW-9, Bharatsinh Arjnaji and PW-2 Bheruji Pathuji Chavda went to the house of the accused. They saw that accused was beating his father with a thick stick of about 2 feet indiscriminately on his body and was inflicting blows one after the other. Deceased was rescued by PW-2 Chavda Bheruji Pathuji and others, whereas the appellant was made to sit in a corner. At that juncture of time, the deceased was conscious and said to PW-2 Chavda Bhreuji Pathuji and other persons that appellant had beaten him severely and had inflicted injuries on his head, stomach, and that it was not possible for him to survive. The deceased also said that appellant was demanding money from him and had taken away from him the bank passbook before a week. PW-2 Chavda Bheruji Pathuji and others asked deceased to keep quite and further consoled that a

vehicle was being summoned for shifting him to the hospital. Govindsinh Rajusinh, who was present was sent to bring a vehicle and others remained at the house of appellant, but some time thereafter deceased died. PW-2 Chavda Bheruji Pathuji at about 18.30 hours informed Mansa Police Station on telephone that in village Ambod, Nandlal Jayshankar Pancholi was severely beaten by his son Ambalal and Nandlal Jayshankar had died. Village people were gathered at the scene of incident. On receiving this telephonic message, PW-11 Joitaji Motiji, who was at the relevant time In-charge of Mansa Police Station, made entry in this regard in Telephone Vardhi Register. Thereafter, simultaneously, an entry was also made in Station Diary vide Sr.No.10 at page No.63 about what was conveyed by PW-2 Chavda Bheruji Pathuji to PW-11 Joitaji Motiji Station. On receiving this information, Joitaji Motiji deputed Head Constable Dhiruji Varvaji of Mansa Police Station to visit village Ambod. Dhiruji Varvaji - PW-12 on reaching village Ambod, found that Nandlal (deceased) was lying on a cot with multiple injuries on head, both the hands, both the legs and chest. He also found that appellant was sitting there. PW-2 Chavda Bheruji Pathuji was present at the house of the appellant. PW-12 Dhiruji Varvaji recorded the complaint of Chavda Bheruji Pathuji about the incident. Thereafter, the investigation was entrusted to PW-15 Dhansinh Changiram Kadhayan at about 19.30 hours. During investigation he drew the inquest panchnama and panchnama of scene of offence. The dead body was sent to Mansa Hospital for postmortem and appellant came to be arrested by him. The appellant also presented stick with which, according to prosecution case, he had inflicted injuries to deceased. Jersey and pant put on by appellant were found blood stained and, therefore, by a panchnama, the same were seized by him. The clothes found on the dead body were also seized. Incriminating articles which were seized including blood stained earth found from the scene of offence were sent to Forensic Science Laboratory. The Investigating Officer, PW-15 Dhansinh Changiram Kadhayan had also recorded the statements of the relevant witnesses.

3. Having collected the evidence, a charge sheet came to be filed in the Court of Judicial Magistrate, First Class at Mansa against the appellant for the offence under Section 302 of the Indian Penal Code as well as under Section 135 of the Bombay Police Act. The case came to be committed by learned Judicial Magistrate, First Class, Mansa to the Sessions Court at Mehsana, as per Section 209 of the Criminal Procedure Code as the same was triable exclusively by the Court of Sessions.

4. Learned Additional Sessions Judge, Mehsana, framed charge against the appellant on 6th of September 1996 at Exh.3 for the offence punishable under Section 302 of the Indian Penal Code. It was explained to the appellant who pleaded not guilty to the same and requested for the trial. Therefore, The prosecution adduced evidence of as many as 15 witnesses and other documentary evidence as under :

Dr. Manubhai Hirabhai Solanki was examined at Exh. 7 as PW-1, who performed autopsy at Civil Hospital at Mansa; Chavda Bheruji Pathuji is examined at Exh. 10 as PW-2 being eye witness and complainant in prosecution case; PW-3 Muktilal Maftlal Chauhan is examined at Exh.11 as PW-3 and being Revenue Circle, prepared a map of scene of offence and produced on record; Satidan Jawardan Gadhavi is examined at Exh.13 as PW-4 being panch of inquest panchnama, Kadarbhai Karimbhai is examined at Exh.15 as PW-5 being panch of arrest panchnama as well as recovery panchnama of stick and panchnama of seizure of clothes of the accused; Akbarbhai Bachubhai Vora is examined at Exh.19 as PW-6, second panch witness of panchnama of arrest etc of the accused, Dasharathbhai Baldevaji is examined at Exh.18 as PW-7 being panch of panchnama of scene of offence; Natwarlal Motilal Purani is examined at Exh.21 as PW-8 being panch of panchnama by which the dhoti from the body of the deceased as was recovered by Police Constable and presented before the Investigating Officer; Mafaji Gobarji Kaluji is examined at Exh. 24 as PW-9, being eye witness of the incident; Prahaladji Kaluji is examined at Exh.25, PW-10 being second panch of panchnama by which Police Constable of Mansa Police Station presented dhoti recovered from the dead body of the deceased; Joitaji Motiji is examined at Exh.26 as PW-11 who recorded telephone vardhi as conveyed by eye witness Chavda Bheruji Pathuji and made entry in the Police Station Diary of Mansa Police Station as he was PSO of Mansa Police Station; Dhiruji Varvaji is examined at Exh.30 as PW-12 being Ist Grade Constable of Mansa Police Station and was deputed first in point of time to visit scene of offence and he recorded the complaint of PW-2 Chavda Bheruji Pathuji; Mahendrasinh Kanasinh Chavda is examined at Exh.32 as PW-13 being eye witness of the incident and Amrutlal Manilal Darji is examined at Exh. 33 as PW-14 being supporting witness who had conveyed to PW-13 Mahendrasinh Kanasinh Chavda about the incident taken place; Dhansinh Changiram Kadhayan is examined at Exh. 35 as PW-15, who was Police Sub-Inspector of Mansa Police Station at relevant time, and investigated the complaint and submitted charge sheet

against the appellant.

5. The prosecution also adduced documentary evidence over and above oral evidence as under :

Postmortem Note at Exh.8, map of scene of offence at Exh.12, inquest panchnama at Exh.14, arrest panchnama of the accused at Exh.16, panchnama of recovery of stick from the accused appellant at Exh.17, panchnama of scene of offence at Exh.20, telephonic vardhi noted in the register of Mansa Police Station at Exh.27, Entry made in the Police Station Diary of Mansa Police Station about information given by Bheruji Pathuji Chavda at Exh.25; report of Forensic Science Laboratory along with the report of Seriological Department are placed at Exhibits 41 and 42 along with forwarding letters at Exh.36 and 37, and panchnama by which Police Constable Joitabhai Kushabhai presented dhoti of deceased before the Investigating Officer in the presence of panchas at Exh. 22.

6. After recording of the evidence, as above said, the learned Trial Judge put all the circumstances to the appellant appearing against him in the evidence and asked explanation from the appellant about each circumstance, as per Section 313 of the Criminal Procedure Code. The defence of the accused in his statement was of total denial, except that, he admitted that his father had died and when the complaint came to be recorded he was present. He admitted that police had arrested him and had recovered a stick from him. He refused to examine himself on oath or to tender any evidence in defence. In a question whether he wanted to say anything further, he tendered his written reply at Exh.42, wherein it was stated that since his childhood he was staying with his father and was doing labour work in carpentry and had served and nursed his father well. It was stated that his father was operated for hernia and during this period, he had attended his father sincerely and his father was also suffering from the other hernia, but surgery was dangerous as per the opinion of the Doctor and, therefore, the surgery was not performed. According to him, his father was aged about 95 years and did not know anything about the incident of 14th of April, 1996 as he had been to Vijapur on account of his carpentry work and on returning to his village at 7.00 p.m, he had found at his residence that village people had gathered and community of Chavda was doing something. He further stated that complainant i.e. prosecution witness Bheruji Chavda had borrowed Rs.30,000/- from his father which was being demanded back by his father as well as he himself

which in turn had ensued in a quarrel between him and Bheruji Pathuji and, therefore, Bheruji Pathuji had harboured enmity against him. It was stated that about their agricultural land, Bheruji being a member of Executive Committee of Panchayat, had administered threats to him and he had not committed the act of murder of his father but Chavda Community, to eliminate him, had falsely involved him in this case. He further stated that had he committed murder of his father, he would have run away and would not have been found present at the scene of offence. According to him, he was aggrieved by the death of his father and was present with the dead body at the hospital where he was arrested by the Police. He further stated that all the witnesses belonged to Chavda Community and they were on inimical terms with him. According to him, he had a quarrel with the prosecution witness Darji Amrutbhai about stitching of clothes and denied to have killed his father.

7. After hearing learned counsels for the prosecution as well as the defence, the learned Trial Judge came to the conclusion that prosecution succeeded in proving beyond doubt that the appellant demanded money from the deceased, which deceased had deposited in the bank, and on denial by the deceased, the appellant inflicted many blows by means of thick stick on the body of the deceased with intention to cause death. The learned Trial Judge relied upon eye witnesses PW-2 Chavda Bheruji Pathuji and PW-9 Mafaji Gobarji and other corroborating evidence of prosecution to hold that charge against the appellant was established. Ultimately, vide judgment and order impugned in this Appeal, the appellant was convicted as above said and sentenced for the life imprisonment. He was given benefit of set off for the period he had already undergone in jail during trail and came to be acquitted for the charge under Section 135 of the Bombay Police Act.

9. Learned Counsel for the appellant Mr. P.M. Vyas who is appointed to assist him, vehemently attacked the prosecution case on the ground that in fact none of the witnesses examined was an eye witness. It was contended that PW-2 Bheruji Pathuji Chavda is a witness, on him no reliance can be placed because there was enmity between appellant and his father on one side and this witness on the other hand on account of Rs.30,000/- taken by the witness Bheruji Pathuji and were not returned even after frequent demands by the appellant and his father. It was contended that witnesses from Chavda Community only were selected by the Investigating Officer whereas PW-2 Bheruji Pathuji being a member of the Executive Committee

of the Gram Panchayat and a person with power, influenced the investigation, which is evident from the fact that in most of the panchnamas, panchas were brought by the Police from other village because no person of village would have supported this investigation. It was contended that so far as the second eye witness PW-9 Mafaji Gobarji Exh. 24 is concerned, he also cannot be believed on account of contradiction in between the statements he offered before the Police and his examination in chief. According to learned Advocate for the Appellant, two main witnesses of the prosecution case i.e. PW-13 Mahendrasinh Kanasinh Chavda, though according to prosecution case was an eye witness, has not supported prosecution whereas PW-14 Amrutlal Manilal Darji a supporting witness also could not have been relied upon in view of contradictions in his evidence as well as in the evidence of other witnesses more particularly when the appellant had inimical terms with this witness also on account of stitching of clothes, for which suggestions were confronted to this witness in cross examination and therefore judgment challenged shall be set aside. It was contended that neither Mahendrasinh Kanasinh PW-13 who being core witness supported the prosecution case nor prosecution examined other material eye witnesses named in the FIR. It was contended that it was not safe to place reliance on the testimony of PW-2 Chavda Bheruji Pathuji and PW-9 Mafaji, and if their testimonies are discarded, then there is no single witness who can be termed as eye witness of the incident to prove the prosecution case. It was also contended that the material witnesses of the prosecution, namely, Bharatsinh and Karansinh, who, according to the prosecution case, witnessed the incident, were not examined by the prosecution and were dropped though they were material and important witnesses. It was also contended that there is no evidence on record that the appellant had a quarrel with his father about money which the father had deposited in bank and that appellant was demanding the said amount, which ensued in death of the father. Prosecution story becomes doubtful on this account according to learned counsel for the appellant. At this juncture, learned counsel for the appellant contended that the written reply at Exh.42 tendered by the appellant may be taken into account that he was not present at the scene of offence when the said incident took place, in which his father received injuries and died. It was contended that as per the reply of the accused under Section 313 of the Criminal Procedure Code, it becomes clear that the appellant was attending his father properly and was serving him sincerely. Deceased had undergone a surgery of hernia earlier and during this

surgery also the appellant attended his father properly. Sum and substance of the contentions of the learned counsel for the appellant was, in all probabilities, it was impossible for the appellant, as a son, to cause death of his father by inflicting injuries with a stick. It was ultimately contended that the prosecution case, as developed through evidence recorded in the court, becomes doubtful, and benefit of the same must go to the appellant and Appeal therefore be allowed.

10. Learned APP Mr.Sudanshu S. Patel contended that in all prosecution examined three eye witnesses of the incident. i.e. PW-2 Chavda Bheruji Pathuji, PW-9 Mafaji Gobarji and PW-13 Mahendrasinh Kanasinh Chavda. It was contended that PW-14 Amrutlal Manilal Darji is supporting witness in corroboration of eye witnesses. It was contended that the evidence of PW-2 Chavda Bheruji Pathuji and PW-9 Mafaji Gobarji does not suffer from any infirmity so as to brush aside this creditworthy evidence. It was contended that though PW-13 Mahendrasinh Kanasinh Chavda did not support the prosecution wholeheartedly and he was required to be declared hostile to the prosecution, his evidence can be made use by the prosecution to the permissible limit as per established law to the extent that PW-13 Mahendrasinh has admitted in his examination-in-chief that he did inform PW-2 Chavda Bheruji and others near Ramji Temple about the incident, which he came to know from PW-14 Amrutlal Manilal Darji. It was contended that mere suggestion about inimical terms of a witness in respect of accused, would not constitute evidence to act upon, especially when those suggestions are denied by respective witness. It was contended that PW-2 Bheruji Pathuji as well as PW-9 Mafaji Gobarji denied all the suggestions made by the defence about, firstly, enmity between the parties, and secondly about the amount of Rs.30,000/- owed by appellant and his father from PW-2 Chavda Bheruji. Merely because, according to learned APP, appellant took the defence of alibi in written statement under Section 313 of the Criminal Procedure Code or pleaded inimical terms with the witnesses, would not discredit the evidence of prosecution, which otherwise appears absolutely creditworthy. Learned APP further stated that incident took place at about 3.00 to 3.30 p.m and witnesses present there attempted to shift the deceased to the hospital, for which arrangement of vehicle was being made, however, before the vehicle arrived, deceased died. It was, therefore, the duty of the citizen to inform the Police about the homicidal death, and accordingly PW-2 Chavda Bheruji Pathuji informed Mansa Police Station through a telephone message

that the deceased was beaten by his son appellant and had died, and that residents of village were collected at the house of the appellant. According to learned APP, this information was relayed to the concerned authority earlier in point of time i.e. about 18.30 hours, and this is evident from the entries placed on record vide Exh.27 and Exh.28. In pursuance of these entries, Head Constable PW-12 Dhiruji Varvaji was deputed to visit the scene of offence for the investigation. It was also contended that in fact what is recorded by PW-11 Joitaji Motiji at Exhibits 27 and 28, must be treated as First Information Report because in pursuance of these entries, the Police machinery was set in motion, that is to say, the investigation had started, and further these entries disclosed explicitly the name of the accused, the name of the deceased and the nature of the incident which had taken place including the name of the informant. According to learned APP, vide these entries, the name of accused and commission of cognizable offence was disclosed and therefore these entries ought to have been treated as FIR. It was contended that the name of the accused was disclosed on record at the earliest at 18.30 hours and thereafter the investigation started and charge sheet was filed. According to learned APP the appellant could not prove his alibi or probablise his defence about inimical terms with the prosecution witnesses, and considering the quality of the evidence of the eye witnesses and absolutely independent corroborative evidence of other witnesses, the prosecution has succeeded in establishing the charge against the appellant. It was, therefore, contended that this is not a case wherein any interference is required by this Court in the impugned judgment and order in this Appeal and Appeal deserves to be dismissed.

11. Having heard learned counsels of both the sides and having gone through the record of the case entirely, it clearly transpires that the prosecution proposed to prove the charge against the appellant by direct evidence, that is to say, through eye witnesses as well as other corroborative and supporting evidence. The learned Trial Judge placed reliance on the evidence adduced by the prosecution and convicted the accused. Being first appellate court, it is necessary for us to undertake thorough exercise of appreciation of evidence afresh and come to an independent conclusion, considering also the contentions raised on behalf of the appellant as well as learned APP in this Appeal.

12. Turning to the evidence as adduced by the prosecution, it clearly appears that the prosecution

proposed to prove its case, first by adducing direct evidence through eye witnesses PW-2 Chavda Bheruji Pathuji, PW-9 Mafaji Gobarji and PW-3 Mahandarsinh Karansinh Chavda. At this juncture, it is necessary to bear in mind that when prosecution proposes to establish the case through direct evidence of eye witnesses, it becomes duty of a court to appreciate such evidence carefully. The evidence of eye witnesses cannot be brushed aside lightly or on imaginary or flimsy ground. Ordinarily, an eye witness is worthy of credence unless it is established that the witness has reason to fabricate the case against the accused and that the facts from other evidence on record establish that it would not be just and proper to rely upon such witnesses. In cases of eye witnesses, such evidence is required to be tested by considering as to what was the proximity of the witnesses with the scene of offence, what was the opportunity available to them to have witnessed the incident, whether the particular eye witness was capable of observing of incident taking place and reproduce the same before the court, etc. Once it is established that the presence of the eye witness at the scene of offence was natural and that he had an opportunity to observe the incident, then unless it is shown that the evidence of an eye witness is tainted for the sound reasons, such evidence must be acted upon. Needless to say that, each case stands on its particular facts, but generally, while appreciating the evidence of an eye witness, the above cardinal rules should be taken into consideration by a court. It is, therefore, necessary first to go through carefully the evidence of three eye witnesses and consider the same about the reliability of evidence of each witness.

12. Here in this case, PW-2 Chavda Bheruji Pathuji stated that he knew the deceased and the appellant because they were from the same village. The appellant and deceased were son and father and were residing in the same house. He further stated that the incident took place on 14th of April, 1996. According to him, about 3.00 p.m. when he was at Ramji Temple of the village. Manhandarsinh Kanasinh of his village came to the temple and said to him that appellant was beating his father and requested him to come with him to rescue the father from beating. Therefore, this witness called three/four other persons and conveyed to them that the appellant had been beating his father Nandlal and they should rescue the father. The witness stated that therefore he himself, Karansinh, Bhikhasinh, Mafaji Gobarji, Govindji Ratuji, Bharatsinh Arjansinh, in all six persons, reached at the resident of the appellant. They all noticed that the

accused had a thick stick in his hand of about 2 feet and had been beating his father indiscriminately and haphazardly on the body of his father. The witness stated that all of them caught hold of the appellant and he was made to sit at a side. The deceased Nandalal told to the witness and others that appellant had beaten him severely and he was injured seriously on the head, stomach, abdomen and it was impossible for him then to survive. According to this witness, the deceased further stated to them that the appellant was demanding money from him and had snatched the pass book of bank before a week. According to this witness, they all pacified the deceased and consoled him that the deceased should keep quite and that the vehicle was being arranged to shift the deceased to the hospital. Govindsinh, who was present at the scene of offence, was sent to obtain a vehicle to shift the deceased in the hospital, and all others sat near the deceased. Before vehicle could be arranged, the deceased died. According to the witness, he informed Mansa Police Station telephonically about the incident which had taken place. Thereafter Head Constable and after Head Constable, PSI came to village Ambod. He stated that he narrated his complaint before Head Constable, which was recorded as dictated by him. The witness further produced the complaint and identified the signature on complaint given by him. He further stated that Police drew panchnama of dead body which was taken to hospital. At that time, the accused appellant was present and was arrested by the Police. Police also seized muddamal stick which he identified in the court. In his cross-examination, in para-4, he emphatically denied that he had thick relationship with the deceased, and that he had borrowed Rs.30,000/- from the deceased. He also denied unambiguously that deceased as well as appellant were asking him to return the said borrowed money which had ensued in a quarrel. He denied that he had any enmity with the appellant. In para-5, he denied that the deceased was sick and infirm though he admitted that the deceased had undergone one hernia surgery but he stated that he did not know whether surgery of the other hernia was to be performed, and since the same was risky, surgery could not be performed. In para-6 he was asked about the population of village Ambod and the distance between the house of this witness and the house of the appellant, in which he replied that the distance between his house and the house of the appellant was hardly needed about 5 minutes to cover. Ramji Temple is situated, according to the witness, hardly at 10 feet distance from his house. He stated that he himself Govindsinh Harjuji, Karansinh Bhikhaji, Mafaji Gobarji, Bharatsinh Arjanji were sitting at the temple only for

chit chatting with each other, and none of the above named were interrelated but were friends. He stated that Mahandarsinh was shouting when he approached Ramji Temple which could be heard by others as well and within five minutes, they had reached at the house of the appellant. In the cross-examination, he further stated that when they reached near the house of the appellant, the incident was still continuing and 50 to 60 persons who were collected there had also seen the incident. When, according to witness, they reached there, the appellant had been beating deceased on head and on abdomen. Mafaji Gobarji and Karansinh Bhikhaji attempted to intervene and thereafter he also intervened. After reaching at the house of the appellant, the incident was over in two/three minutes and it was about 3.10 to 3.15 p.m. The appellant, according to this witness, was caught hold by all the three including him and was made to sit on a side. Deceased was conscious at that moment and even though he had received severe injuries, he gave details of the incident. Thereafter, he was made to lie on a cot. Thereafter this witness was asked that nothing was stated to him by the deceased even about the bank pass book or about money to which the witness denied. He also denied that he had borrowed Rs.30,000/- from the deceased. He denied that he falsely implicated the appellant in the incident. In first point of time, Mafaji Gobarji came to know that deceased had died and thereafter he conveyed this incident to Mansa Police Station. According to him, the instrument of phone from which he had conveyed message to Mansa Police Station was situated at about 01.00 km from the scene of offence and he had walked that distance. He said that, conversation with the Head Constable of Mansa Police Station had lasted for about five minutes and at that time, Deputy Sarpanch Deepsinh Chhagansinh as well as Gandabhai Shivabhai were present. He mentioned the details which he conveyed to Mansa Police Station. At about 5.30 Police had reached at the scene of offence and had inquired about him, and he had introduced himself to the Police. The Police had recorded his complaint. Thereafter, he was asked about the contradictions with respect to the complaint he had filed before the Police about whether he stated in the complaint that while they were sitting at Ramji Temple, Mahandarsinh came there and stated that the appellant had been beating his father, so let us go there. The witness stated that he had narrated this fact in the complaint. Thereafter, some other contradictions also were asked to which the witness stated that he was not in position to remember properly that whether such statement was made by him in the complaint. At this juncture, it is pertinent to note

that though the contradictions were attempted to be proved in the cross-examination of the witness, but his attention to the complaint or statement as recorded by the Police, was not drawn either by the learned Advocate for the defence or by the learned Trail Judge. The witness denied that the accused was not present and had gone out for his carpentry work. He stated that other family members i.e. Jayantibhai, brother of the appellant was called by him. He denied that sister of appellant Narayani was called by him. He denied the allegation that he had not witnessed the incident.

13. The second important eye witness PW-9 Mafaji Gobarji Exh.24, stated that the incident took place on 14th of April, 1996 at about 3.00 to 3.15 p.m. and he was at Ramji Temple. According to him at that time Mahandarsinh shouted that appellant was beating his father indiscriminately, therefore, he himself, Bherusinh, Bharatsinh, Karansinh, Mahandrasinh, etc. had been to Pancholi Vas. It is stated that when they reached there, they saw that the appellant was beating his father with a stick. It was mentioned that the appellant was inflicting stick blows haphazardly on the body of the deceased and injuries were caused on his chest and on stomach. As per him, all of them caught hold of the appellant and he was taken at a side and that the deceased stated that the appellant had severely beaten him. According to him, they asked why he was beaten by his son and deceased replied that he was beaten for obtaining money from him. Thereafter, as per him, Govindji was deputed to search vehicle to shift the deceased to the hospital. The deceased died thereafter and in pursuance of a telephone made by Bheruji, the Police reached to the scene of offence and Bherusinh lodged complaint, which was recorded by the Police. He identified the accused before the Court. In cross-examination, an attempt was made to show that relationship between witness Bherusinh and this witness was thick and to this he denied emphatically. He denied that deceased was sick and infirm. He expressed his ignorance about any incident which might have occurred earlier to this incident between appellant and his father. He admitted that the deceased was operated for hernia but denied that appellant had attended his father at that time. It was put to him that panch of panchnama of scene of offence Satidan Jawardan Gadhavi had purchased land from the deceased, to which the witness admitted, but suggestion that the said land was to be purchased by witness Bherusinh and, therefore, a quarrel ensued in this respect between deceased and Bherusinh, was denied by the witness though he admitted that

deceased was devotee of Ramji temple. He also denied that Bheruji had borrowed Rs.30,000/- from deceased and due to this, Bherusinh and appellant were not on good terms. On the contrary, in cross-examination, it was asserted that while they were sitting in Ramji Temple, Mahandarsinh came there and on being informed by Mahandarsinh, they reached Pancholi Vas in couple of minutes and when they reached Pancholi Vas, the incident was going on. In cross-examination, in reply to a question, he also stated that appellant haphazardly inflicted injuries on different parts of the body of the deceased and the deceased was in position to speak and was conscious to some extent. In cross-examination, attempt was made to bring on record certain contradiction by the defence about whether the witness was going to his field or whether he was sitting at Ramji temple when witness Mahandarsinh informed them about the incident, but in this respect, the witness stated that he could not properly remember what he stated before the Police. With regard to inflicting blows indiscriminately on the body of the deceased by appellant, the witness stated that he could not properly remember whether he had stated this fact in his Police statement. Again it is pertinent to note here that neither learned defence counsel nor learned Trial Judge had drawn attention of the witness to his Police statement. He denied that his police statement was recorded at the instance of Bherusinh and that he was deposing falsely on pressure by complainant Bheruji Pathuji.

15. The third important witness in this sequence is PW-13 Mahandarsinh Kanasinh. As per prosecution case, he was an eye witness of the incident but he did not support the prosecution case. In his examination-in-chief, he stated that the incident took place on 14.4.1996 and at his residence some religious occasion was going on. According to him, when he came out and was standing near Ramji Temple, Amrutlal Darji shouted that the appellant had been beating his father and, therefore, he informed Bherusinh and other persons sitting in Ramji Temple. He denied to have gone to the house of appellant. In cross-examination by learned APP he was confronted with his police statement but stated that he did not actually witnessed the incident. In cross-examination by defence he stated that the deceased was aged person but denied that he was sick and infirm. He stated that he thereafter went to the house of the appellant where 30 to 40 persons were collected.

16. The fourth and last witness in this sequence is PW-14 Amrutlal Manilal Darji Exh. 33. He is not an eye

witness but a supporting witness. He stated that on 14th of April, 1996 when he was at his residence, he heard commotion in the house of the appellant and started shouting that the appellant was beating his father and he went to Ramji temple with intention to call somebody to rescue the father of the appellant. As per him, he found PW-13 Mahandarsinh standing on the otla of Ramji temple and he conveyed this fact to PW-13 Mahandarsinh. In his cross-examination, it was admitted by him that the deceased was aged and sick. He stated that to his knowledge, earlier no incident had taken place between the father and son. Though he is not an eye witness, the question regarding situation of his house as well as house of the appellant was asked in his cross-examination, and he stated that he could not see inside the house of the appellant from his house. He stated that on hearing the shouts, he went to Ramji Temple only with intention to call somebody. He denied that he did not hear shouts from the house of the appellant. He also denied that he did not hear the shouts that the appellant was beating his father.

16. Now, this direct evidence adduced by the prosecution of the above witnesses deserve to be appreciated thoroughly. On careful scrutiny of evidence of above four witnesses, the same is found to be inspiring confidence about what they have said in their depositions. The test to appreciate the evidence of eye witnesses is to scrutinise surrounding circumstances, environment in which the crime was committed, relationship of the witness with the accused and whether the witness has withstood the test of cross-examination. When we appreciate the evidence, we find that PW-9 Mafaji Gobarji as well as PW-2 Chavda Bheruji Pathuji appear to be natural witnesses in the sense that their presence at the scene of offence cannot be doubted. The incident took place at about 3.00 p.m. At that time, it is quite natural for all the witnesses to go to the Ramji temple and have chatting. It is noteworthy that the population of village Ambod, as per the evidence, is only about 2,000. Ramji temple appears to be the place where people sit and meet each other. At the same time, the sequence of events, which is disclosed by the above evidence, makes it clear that there is no fabrication or falsity in it because PW-14 Amrutlal Manilal Darji heard shouts and informed Mahandarsinh Kanasinh PW-13, who in turn informed PW-2 Chavda Bheruji Pathuji and others, who were sitting there. The people in the small village having population of 2,000 always reside with co-operation of each other and take part in the joy, pain and bereavement of others. If any household faces any problem, it

becomes the problem of the village, and others would try to solve this. Therefore, the conduct of the witnesses appears to be quite natural when they went to the house of appellant on hearing shouts that appellant was beating his father. They immediately reached the house of the appellant to rescue a fellow villager who was aged about 80 to 85 realizing that it was their duty to cool down the quarrel. In this natural process, these witnesses, especially PW-2 Chavda Bheruji Pathuji and PW-9 Mafaji Gobarji witnessed the incident, which is the guarantee of their truthfulness. The simplicity of the testimony of PW-2 Bheruji Pathuji as well as PW-9 Mafaji Gobarji reflects the naturalness and truthfulness on their part inspiring confidence. At the same time, we find nothing in lengthy cross-examination of the defence to discredit the testimony of these two witnesses. Their version clearly appears cogent and consistent, more so when, nothing is shown by the defence that they were interested or partisan witnesses. From the cross-examination itself it has come out that both the above witnesses PW-2 Chavda Bheruji and PW-9 Mafaji Gobarji were independent witnesses and reliable, and their purpose was only to rescue the old man from severe beating at the hands of his son. Both the witnesses have corroborated each other. Not only that, but PW-13 Mahandarsinh though a hostile witness, supports the prosecution case to the extent that PW-14 Amrutlal Manilal Darji had informed him that appellant was beating his father and he did inform to all others sitting inside the Ramji Temple. We do not find anything doubtful therefore in the evidence of these two eye witnesses i.e. PW-2 Chavda Bheruji Pathuji and PW-9 Mafaji Gobarji.

17. The defence has attempted to create vague and ambiguous hunches in cross-examination levelling allegation against PW-2 Bheruji Pathuji, firstly alleging borrowing of money by witness Bheruji from deceased and secondly, on account of purchase of some land of the deceased. Both the allegations were emphatically denied by the respective witnesses. It is not sufficient to merely allege through the suggestion in cross that there was enmity between complainant and witnesses on the one part and the accused on the other, but for that, a foundation has to be laid by the defence. We do not find the evidence worth the name about so called enmity between the parties except mere suggestions to the witnesses in cross-examination which were denied emphatically. We are not in a position, therefore, to accept the contention of learned counsel that due to enmity the appellant was falsely involved in this case. The law, as it stands, is that even testimony of inimical

witnesses cannot be discarded on the ground of enmity, if otherwise, the witness is convincing and reliable. In this case, there is no evidence at all to conclude that PW-2 Bheruji Pathuji and other witnesses were on inimical terms with the appellant to such on extent that they would involve the appellant in the serious case of a murder falsely. A witness is normally considered independent unless he springs from sources which are likely to be tainted. As above discussed, we do not find any detail about the amount advanced by the deceased to PW-2 Chavda Bheruji Pathuji. We do not find any detail about alleged enmity on account of purchase of land of deceased, which PW-2 Chavda Bheruji intended to purchase. On the contrary, we find flawless consistency, cogent narration of the incident as had been witnessed by the witnesses and nothing could be brought on record by the defence in cross-examination to discredit these natural witnesses and to brand them as liars.

18. So far as PW-2 Chavda Bheruji Pathuji and PW-9 Mafaji Gobarji are concerned, it is noticed by us that some contradictions were asked to the witness in cross examination with reference to the complaint and the statement recorded under Section 161 of the Criminal Procedure Code. So far as PW-2 Chavda Bheruji Pathuji is concerned, however, the defence has not attempted to prove these contradictions through proper witness i.e. from witness Joitaram who recorded complaint but so far as PW-9 Mafaji Gobarji is concerned, the contradictions asked to this witness are attempted to be proved in the deposition of the Investigating Officer. Section 162 (2) of the Criminal Procedure Code makes it amply clear that the use of the police statement is limited for contradicting the witness as per Section 145 of the Indian Evidence Act. Now, provisions of Section 145 of the Indian Evidence Act permits cross-examiner to put questions to the witness without showing or referring to his previous statement, but if such contradictions are proposed to be proved, then it is necessary that the attention of witness must be drawn to his previous statement, and then and then the contradictions can be said to have been proved. What has happened in this case is that some contradictions are asked in cross of respective witness. With reference to the said contradiction, witnesses have replied that they could not properly remember what had they stated before the Police or in complaint. At that juncture, as per the provisions of Section 145 of the Evidence Act, the attention of the respective witness was required to be drawn to his police statement or complaint. If this is not done, then there is no compliance of Section 145 of the Indian Evidence

Act, and the contradictions which were proposed to be proved, could not said to have been proved. In the matter of RAJ KISHORE JHA vs. STATE OF BIHAR AND OTHERS, as reported in (2003) 11 SCC 519, the Apex Court in paras 13 and 14 observed as under :

"13. The question of contradicting evidence and the requirements of compliance with Section 145 of the Evidence Act has been considered by this Court in the Constitution Bench decision in the case of Tahsildar Singh v. State of U.P. The Court in the aforesaid case was examining the question as to when an omission in the former statement can be held to be a contradiction and it has also been indicated as to how a witness can be contradicted in respect of his former statement by drawing particular attention to that portion of the former statement. This question has been recently considered in the case of Binay Kumar Singh v. State of Bihar and the Court has taken note of the earlier decision in Bhagwan Singh v. State of Punjab (1) and explained away the same with the observation that on the facts of that case there cannot be a dispute with the proposition laid down therein. But in elaborating the second limb of Section 145 of the Evidence Act, it was held that if it is intended to contradict him by writing his attention must be called to those parts of it which are to be used for the purpose of contradicting him. It has been further held that if the witness disowns to have made any statement which is inconsistent with his present stand, his testimony in court on that score would not be vitiated until the cross - examiner proceeds to comply with the procedure prescribed in the second limb of Section 145 of the Evidence Act.

14. The aforesaid position was indicated in Rajender Singh v. State of Bihar."

19. The net result of this discussion is when contradictions are not proved, it is assumed that the witnesses have maintained consistency before the police as well as before the court. Unless they are discredited otherwise, their testimony must be accepted, and we are inclined to accept the testimony of these two eye witnesses as supported by other two witnesses i.e. PW-13 Mahandarsinh Karansinh Chavda and PW-14 Amrutlal Manilal Darji, and the contentions raised on behalf of the appellant that due to enmity, the appellant is falsely

involved in the case, must not find any favour. In fact, the prosecution has been to prove its case beyond any reasonable doubt through this direct evidence.

21. Yet, we do not rest here and when we undertake overall scrutiny of the wholesome evidence, we find that the direct evidence is amply corroborated by the other evidence which calls for appreciation at our hands. Very important witness in this respect is PW-11 Joitaji Motiji, examined at Exh.26, who was In-charge of Mansa Police Station and received telephone message from PW-2 Chavda Bheruji Pathuji at 18.30 hours. In the said telephone message which was received by him, it was made clear that Nandlal Jayshankar Pancholi was killed by his son Ambalal by beating severely and the village persons had collected there. This was recorded by PW-11 Joitaji Motiji in Telephone Vardhi Register of the Police Station as well as in the Station Diary. The Telephone Vardhi Register is produced at Exh.27 while copy of the entry in the Station Diary is produced on record at Exh.28. We are in complete agreement with the submission made by the learned APP that in fact this Exh.27 ought to have been treated as First Information Report. This is so because Exh.27 clearly discloses the name of the assailant, the name of the deceased i.e. victim, in the name of informant, the manner in which the incident took place, including the telephone number of village Ambod, from where the informant i.e. PW-2 Bheruji Pathuji Chavda was relaying information. While we consider Exh.27 as First Information Report, the conclusion inevitably is that, before police authorities, soon after the incident, the names of the assailant and the deceased were disclosed including the manner of the incident. It is very pertinent to note that the receiving of the telephone message by PW-11 Joitaji Motiji from PW-2 Bheruji Pathuji Chavda and recording by PW-11 Joitaji Motiji of such information in his official capacity in the public documents, has not been challenged by the defence in cross-examination. Therefore, the deposition of the eye witnesses is corroborated by this evidence and the evidence of PW-11 Joitaji Motiji along with Exh.27 and Exh.28 lends credence to the oral testimony of the two eye witnesses. PW-11 Joitaji Motiji soon thereafter vide Yadi Exh.29 deputed Police Constable Dhiruji Varvaji to village Ambod. Police Constable Dhiruji Varvaji is examined as PW-12 to corroborate the say of the eye witnesses. He stated that he reached at the scene of offence and found that the deceased with multiple injuries, on his body, was lying on a cot whereas the accused was present there and he recorded the complaint of the complainant PW-2 Bheruji Pathuji Chavda. In

cross-examination, nothing is brought out by the defence to discredit this witness, but on the contrary, it has come out in cross-examination that the witness Dhiruji Varvaji first ascertained that who was Bheruji Pathuji Chavda who telephoned to Mansa Police Station and after properly ascertaining identity he recorded complaint of PW-2 Chavda Bheruji Pathuji as dictated and offered by the complainant. This evidence clearly corroborates the say of the eye witnesses.

22. Not only that when we peruse the evidence of PW-1 Dr. Manubhai Hirabhai Solanki, who was Medical Officer at the relevant time in Mansa Government Hospital and received the dead body at 9.15 a.m. of 15th of April, 1996 and performed autopsy, he found following 30 injuries on the dead body, as under :

(1) Abrasion over middle of forehead, size about 1.5 x 1 cm.

(2) Bruise mark over forehead, right side, size about 3 x 3 cms, shape irregular.

(3) Swelling over occipital region, size about 8 x 7 cms.

(4) Lacerated wound over middle of occipital bone region, size about 2 x 0.5 cms, bone deep, clotted blood present in wound and surround the wound and in hair.

(5) Swelling over tempore parietal bone region Rt. side, shape irregular, size about 15 x 10 cms.

(6) Bruise size about 2.5 x 2.5 cms present over parietal prominae region Rt. side, shape irregular (margin).

(7) Bruise size about 1.5 x 1 cm over (lt) mastoid region, size irregular.

(8) Bruise over (lt) mandible ankle region, size about 1 x 1 cm.

(9) Multiple contusion mark over front of neck, size about 2 to 4 cms long x 1 to 2 cms, contusion mark passing across neck and some of them having irregular shape.

(10) Bruise over ankle of mandible. Rt. side, size 1.5 cm x 1 cm.

(11) Multiple bruise mark over manubrium sterni, Rt. infra - clavicular region, size varying about 3 to 4 cms long x 1 to 2 cms.

(12) Bruise mark over Rt. pectoral region started from nipple to left border of sternum from 2nd to 3rd inter-costal space extend to medial, size about 8 cms x 4 cms.

(13) Multiple contusion over lower part of chest. Rt & Lt. side at level of 7, 8, 9th rib anterior.

(14) Surgical emphysema present on Rt. pectoral region, both axilla regions.

(15) Abrasion size about 2 x 1 cms over Rt. arm, M/3 anterior medial aspect, shape irregular.

(16) Abrasion on post aspect of Rt. elbow, size about 2 cms x 1 cm.

(17) Abrasion size about 1 x 1 cm over 1st interphala of Rt. hand.

(18) Multiple abrasion over post aspect of lt. elbow.

(20) Lacerated wound size about 1.5 x 2 cms over middle phalanx of Index finger of lt hand, blood in wound and surround the wound.

(21) Abrasion size about 2 x 1 cms on upper and post aspect Rt. shoulder joint, shape irregular.

(22) Abrasion over lower part of Rt. scapula. Size 3 x 1 cm, shape irregular.

(23) Contusion over ankle of Rt. scapula, size about 3 cms x 1 cm.

(24) Abrasion size about 4 cm x 2 cms, round shape. Lower part of chest, post aspect at level of 9 and 10th rib.

(25) Contusion on lower part of lt. inferior ankle of scapula, size about 5 cms x 2 cms. Rib pattern.

(26) Bruise over 2 cm below midinguinal point. Lt side, size 2 x 1 cm.

(27) Bruise size about 2 x 1 cm over ant. superior iliac spine left side.

(28) Abrasion, size about 4 x 1 cm, over ant. aspect of Rt. tibia.

(29) Contusion mark Rt. knee joint ant. aspect size 2 x 1 cms.

(30) Abrasion Size 1 x 1 cm on medial mellows lt. ankle.

He also found following internal injuries

(20) Parietal pleura turn over middle lobe on right side and upper lobe on left side. Size about 5 x 6 cms respectively. Right lung collapsed and blackened. About 500 ml blood found in right thoracic cavity. Middle lobe was lacerated with pleura size about 5 x 0.5 x 0.5 cms on front side.

About 250 ml blood found in left thoracic cavity. Upper lobe lacerated about 6 x 0.5 x 0.5 cms fracture pleura on front side at 3rd rib level outside and lacerated of right lung at level of 4th rib outside MCL.

(20A) On exposure of skin hematoma found over right and left parietal regions. On right side which was extended upto infra-clavicular region on laterally upto axilla and upto lower border of chest wall (upto 7 and 8th ribs) on left side hematoma extend laterally upto axilla and inferior upto 7 and 8th ribs.

Broken end of 3rd rib on left side and 4th rib on right side projected from pectorals major muscle and lacerated muscle and directed into thoracic cavity. On exposure of ribs and sternum, a big

hematoma present over retro-sternum region. (Ant. media sternum) and over pericardium (middle media sternum) Retrosternum extended on both sides right and left side under surface of ribs upto 2nd to 5th rib on both side rib upto MCL. Hematoma also present over pericardium. (Middle media sternum pericardium) cavity was intact. Hematoma was contusion with retrosternum hematoma.

The witness deposed that the death in his opinion was caused due to multiple injuries on body of deceased particularly chest, liver and spleen injuries. He also stated that those injuries could be caused by muddamal stick article No.3 and were sufficient in ordinary course of nature to cause death. In his cross-examination, an allegation was levelled against him that he did not perform autopsy himself but he denied the allegation. He admitted that on postmortem it was revealed that the deceased had undergone surgery of hernia. He denied that the injuries which were found on the body of the deceased could not have been caused by one person. He denied that he violated the discipline, rules and ethics while performing the postmortem. Therefore, the evidence of PW-1 Dr. Manubhai Hirabhai Solanki, Medical Expert, fully corroborates the say of eye witnesses.

23. During the course of investigation, the Investigating Officer seized clothes of the appellant vide panchnama at Exh.16. Though panchas PW-5 Kadarbhai Karimbhai and PW-6 Akbarbhai Bachubhai did not support panchnama at Exh 16, but this panchnama is amply proved by Investigating Officer - Dhansinh Changiram Kadhayan PW-15, wherein he stated that he arrested the accused and seized the muddamal and all the panchnamas were drawn before him and in the presence of panchas. Like wise, vide panchnama Exh.17, the appellant presented before the police the stick used in crime and again the same panchas i.e. PW-5 Kadarbhai Karimbhai and PW-6 Akbarbhai Bachubhai did not support the prosecution case but this panchnama was proved by Investigating Officer and the fact of his arrest and recovering stick from him has been admitted by the accused in his statement under Section 313 of the Criminal Procedure Code. Police also seized the clothes put on the body of the deceased including blood samples of the deceased and seized muddamal articles were sent to the Forensic Science Laboratory. Vide analysis of Forensic Science Laboratory results, copy of which is placed at Exh.40, it is revealed that the blood group of the deceased was of 'B' (B Group).

The same blood was found on sample No.A stick and sample C/1 i.e. the jersey recovered from the appellant. The same blood group was found on sample 'B' which is earth collected from the scene of offence. This fact again corroborates the eye witnesses and lends credence to the prosecution case. The appellant fails to explain this circumstance appearing against him that how the blood group of the deceased was found on the clothes put on by him and on the stick recovered from him. This establishes proximity of the accused - appellant with the deceased at the time of the incident.

24. The prosecution has succeeded in proving panchnama of scene of offence as well as inquest panchnama. Both panhnamas are corroborative piece of evidence and they fully corroborative evidence of eye witness.

25. The defence of alibi put up by the appellant through written reply tendered by him in explanation under Section 313 of the Criminal Procedure Code is of no substance. Firstly, appellant did not lead any evidence in this respect, and secondly, in view of thumping and reliable evidence as discussed above against the appellant, the defence pleaded by him even remotely does not stand probablised. His plea about alibi and enmity must be rejected.

26. We do not find any substance in the contention of learned counsel for the appellant that other eye witnesses i.e. Karansinh and Bharatsinh are not examined by prosecution and, therefore, prosecution should fail. It is absolutely in discretion of the prosecution that how many eye witnesses should be examined by it. Point, therefore, is whether the evidence tendered by the prosecution is found deficient. If so, then the question of non-examining the material witness be looked into. But when case is amply proved by the evidence tendered by the prosecution, then question of dropping of material witnesses would not arise at all. Over and above, the case is though proved by the prosecution through the evidence tendered, the defence failed to raise any objection while such dropping pursis was tendered by APP during trial.

26. From the above discussion, it is clearly established that this is a perfect case wherein the prosecution was able to prove the charge against the appellant without any reasonable doubt. The facts are clearly covered by Clause 3rdly of Section 300 and punishable under Section 302 of the Indian Penal Code.

We do not find any reason for interference with the findings of the Trial Court convicting the accused appellant and sentencing him as above said.

27. In view of the above discussion, the Appeal fails and stands dismissed.

(J.M. Panchal,J.)

(J.R. Vora, J.)

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